The Madras Law Journal

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THE ADMINISTRATION OF CIVIL JUSTICE IN THE MADRAS PRESIDENCY.

The Administration of Civil Justice in the Madras Presidency during the year 1912 presents some features which deserve serious consideration. The number of suits instituted during the year was 484662. The figure though striking is by no means an indication of any abnormal craving for the pastime of litigation. Excluding the area within the jurisdiction of the Original Side of the High Court, the ratio of institution to population was 1 to 85. This does not argue as has been hinted at in certain quarters either that the people have become more litigious or that the increase in the number of practitioners has led to the fomenting of costly litigation; on the other hand, the fact that excluding suits withdrawn or compromised 75 out of every 100 persons who went to Court succeeded in their claims shows that litigation was necessary. One inference that can be drawn is that the people have become poorer: for if a defendant has no defence, it is because he is unable to meet the demand in time that he is sued. Another inference that can be drawn is that owing to the inordinate time taken up in litigation in Indian Courts, and the difficulties of creditors in realizing their dues, debtors are emboldened to set up any defence so that the evil day may be put off as much as possible. Another noticeable feature of the year's report is that there have been 16 temporary Subordinate Judges, and a dozen temporary District Munsiffs; the number of temporary Sub-judges has been increasing from year to year. It is extra-ordinary that until very recently no serious attempt was made to examine into the necessity for their continuance. Mr. Phillips who has been on special duty submitted his report some months ago. It is said that his views are now before the Government. We must point out that a report of this kind ought to be placed on the Editor's table before the Government passes final orders on the subject. The people have a right to know what the recommendations are and how far they should be supple-

mented or varied. There can be nothing confidential in a report dealing with the necessity for an increased judiciary and the Government will gain in strength and prestige, if the people are taken into its confidence. The various Bar associations are entitled to submit their suggestions on the report of the Commissioner: and the Government will be in a position of greater security, if criticism is invited. Comments *ex post facto* can serve no good purpose in matters of this nature. While on this subject, we must draw the attention of the Government to the urgency there exists for rearranging the proportion of the various grades of Sub-judges. Temporary appointments secure an advantage from the point of view of Government. All of them are in the lowest grade, whereas if there is a permanent staff, there must be a readjustment of the grades. We hesitate to believe that the delay in making their appointments permanent is due to any such feeling. The present arrangement has been fruitful of hardship to an overworked and deserving class of Subordinate officials and we venture to hope that the order of the Government will carry out the work of fixing the proportion of the various grades at once. These remarks apply *mutatis mutandis* to the Munsif's Courts.

We have been under the impression that the question of increasing the pay of the Munsiffs and of the Sub-judges was engaging the attention of the High Court and of the Government; We are sorry that the obvious duty which the Government is under to these subordinate judicial officers should have been so long in incubation. The best intellects of the country are given to the work of judicial administration, and it is much to be regretted that neither the High Court nor the Government has shown greater appreciation of the excellent work done by them. We do not find in this year's Government order even the formal acknowledgment of the good work done by these officers as used to be the case hitherto. We press upon the notice of the learned judges of the High Court and upon the Government the reasonableness of the demand for increased pay to Munsiffs and Sub-judges and hope that it will not be long before their just claims are recognised. In this connection, we must not omit to notice that the pay of the members of the Provincial Service serving as District Judges should be increased. As was said before the Public Service Commission recently in Calcutta by a European witness, this difference in pay has a tendency to stamp the recipient as possessing an inferior status. Moreover as from this class of officials promotions are made occasionally to the High Court, the comparative disparity between the two salaries makes the present conditions of pay very anomalous.

Notwithstanding the large number of temporary Courts the average duration of suits showed a tendency to rise. It is undisputed that our Subordinate judicial officers give the best of their time and energy to the disposal of the work before them. They do not spare themselves and very often wreck their lives in the race to cope with their heavy work; and yet arrears have been accumulating. There is but one answer to this state of affairs. The number of Munsiffs and Subordinate judges should be considerably increased. We sometimes hear, although we are glad to note that this is not a prevailing sin, that cases are very summarily dealt with in order that a clean balance sheet may be shown. We have no regard for a judge who puts his prestige and prospects of promotion above considerations of well-considered and evenhanded justice. To persons of this bent of mind, we would recommend the perusal of the excellent observations of Sir Arnold White at the recent Bar Dinner. At the same time, the Government is under an obligation to the public to see that temptations of this kind are not placed before judicial officers. The Government is bound to see that suitors do not come out of court disheartened and dispirited, because the presiding officer is not able to find the time requisite for the consideration of the case before him. And we sincerely hope that the number of tribunals will be so increased that there may be no room for indulging in hasty disposals. In England, if a case is prolonged beyond six months, there is a great outcry for increase in the number of judges. In this Presidency we find that the average duration of a suit in a Munsiff's Court was 245 days, in the District and Subordinate Judges' Courts, 349 days and in the High Court (Original side) 592 days. As regards appeals the average duration in the District and Subordinate Judges' Courts was 226 days, and in the High Court, it was 657 days as regards first appeals and 603 days as regards second appeals. The figures are appalling and not only for what is plain on the face of it, but still more for what lies behind. When an average is spoken of, it implies that some very old cases are pending: we know that there are appeals of 7 years' duration still on the file of the High Court. Sometimes appeals very recently filed are taken up, while old sores remain undressed. We believe it is so in the Lower Courts. The cases involving serious issues and demanding larger attention are laid aside and those of easier complexion are dealt with. It is because the judiciary is very much undermanned and the authorities are believed to attach importance to the disposal that such a course of procedure is rendered possible: we are not sure that the true significance of this deplorable condition of the arrears is realised in the proper quarters. It is

denying justice to ask a man to wait for two, three, and four years before he is given a hearing. When one has to remember the chances of appeal, of second appeals, and of the difficulties in execution, it is wonderful how patient the Madras suitor is. We hope the Honourable Judges of the High Court and the Government will take such steps as will considerably minimise the evil we have alluded to.

The Government has been able to realise a surplus of over 25 lakhs of rupees from litigation: and yet the printing and translation charges in the High Court continue to be prohibitive and the pay of the clerks of the various grades of Courts continues to be unsatisfactory. We do not think that the Government should consider litigation as a source of Revenue. If there has been a larger income from the courtfees, it is incumbent upon the Government to see that greater facilities are given to suitors to have speedy and satisfactory justice. The undermanning of the clerical establishment has been adverted to in the Legislative Council. The inadequacy of the pay of the Amins and process-servers was also discussed. There has been no indication that the Government is alive to the necessity for a careful enquiry into the matter.

The Government draws the attention of the Collectors to the remarks of the Judges of the High Courts on the working of the Estates Land act. We venture to think that it is the Government that has to weigh the observations and not the Collector. When the Estates Act was under discussion, every endeavour to entrust the cases to the ordinary civil tribunals was resisted by the Government mainly on the ground that speedier justice was possible in the Revenue Courts. That dream has not been realised. The parties have had to suffer great hardships by being obliged to go from camp to camp with all their witnesses. This is not all. Even for filing cases, the parties have to move from camp to camp and are made to wait the pleasure of divisional officers. Naturally enough, the Deputy Magistrate pays less attention to the disposal of these Revenue cases than he does to criminal cases and to ministerial revenue functions. His training is against hearing both sides and taking down depositions. The result has been very unsatisfactory to the litigant public. Far from being a summary and inexpensive court, litigation in the Revenue Court even for petty sums has proved to be more costly and protracted than litigation in the civil courts. Now that the Act is about to be revised, we hope the Government may find it possible to remove most of these cases from the jurisdiction of Revenue Courts and to vest them in the

ordinary Civil Courts or to invest Munsifs with powers of Divisional Officers for the purposes of the Madras Estates Land Act.

Before we close this examination of the judicial administration of the Presidency, we must express our great regret that for a number of years, the Judges of the High Court have not been able to find time to inspect the Subordinate Courts. Periodical visits of this nature have a double value. They keep the Courts in order instead of engendering in them a belief that they are uncontrolled. They have an educative value in that it will enable the inspecting judge to understand the difficulties of a subordinate tribunal. This will also enable the High Court to apply its mind to remedying the defects existing in the Courts under their superintendence.

THE MALABAR MARRIAGE AND INHERITANCE BILL.

(Continued from 25 M. L. J. 244.)

In a former article while considering the restrictions imposed by the Bill in the matter of contracting *Sambandams* we did not advert to one matter which requires to be made clear. Nair ladies may contract Sambandams with persons who have a different personal law. For instance, *Sambandams* with Nambudries are very common. The question is whether the scope of the Bill covers such cases or if not whether it is desirable to extend its scope to such cases also. According to S. 1 cl. (a) the Act extends to the whole of the Madras Presidency and to the followers and descendants of such followers of the Marumakkathayam or Aliyasantana Law residing elsewhere and who have not adopted the law of their domicile. According to this clause the Bill applies to all followers of the Marumakkathayam Law whether they be Hindus or Mahomedans. People who are governed by the Hindu Law will not come under this description. We take it also that although the Nambudri may be said not to be governed by Hindu Law as regards the management and alienation of property he cannot be said to be a Marumakkatayam Hindu within the meaning of S. 3 of the Bill or a follower of the Marumakkatayam law within the meaning of S. 1 cl. (b). It will, therefore, appear that the object of the author of the Bill is not to include Sambandams contracted by such persons. If this be his object it has not been carried out. S. 3 states that the *Sambandham* of a Marumakkatayam or Aliyasantana Hindu subject to the restrictions herein contained shall be deemed to be a valid legal marriage for all legal purposes. The section speaks only of the *Sambandham* of a Marumakkatayam Hindu. There is nothing either in this section or in any other

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section to show that it is essential that both parties to the *Sambandham* should be Marumakkatayam or Aliyasanthana Hindus and cl. (c) which only states that the parties should not belong to the different communities between the members of which, according to custom or usage applicable to either community, cohabitation is prohibited favors the view that both parties need not be Marumakkatayam or Aliyasanthana Hindus and that it is enough if one party is of the latter class while the other may be a Hindu belonging to a community whose members are by custom permitted to cohabit with the Marumakkatayam or Aliyasanthana Hindus. Although S. 3 excludes the case of Marumakkatayam Mahomedans, still in the view that the section does not insist upon both parties being Marumakkatayam Hindus the case of Marumakkatayam Mahomedans may also come in but for S. 3 cl. (c). Again the exception to S. 11 supports the above view. That exception provides that the provisions of the section shall not apply to persons who have a personal law of marriage and who contract a *Sambandham* under this Act except so far as the self-acquisitions of the husband are concerned. This shews that persons who have a personal law of marriage may contract a *Sambandam* under this Act. We have to observe in this connection that we do not know what the author of the Bill means by saying " contract a *Sambandam* under this Act." We hope he only means by this expression " contract a *Sambandam* which is valid under this Act" for there is no formality prescribed under this Act as under the old Act. Coming to the point on hand we may state that the exception relates to persons who are governed by Hindu Law and thus have a personal law of marriage. It also applies to others but we are not concerned with them just at present. The question, however, is whether Nambudries who are junior members of an illom and who contract *Sambandams* with respectable Nair ladies can be said to be persons who have a personal law of marriage. In Wigram's Malabar Law 1st Ed. page 3, it is stated : " In order to maintain the rule of impartibility among the Brahmins it is customary for the eldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliance with Sudra women." It was thought that by this custom the junior members were prohibited from contracting valid marriages. This, however, has been shewn to be erroneous. See *Pappi Anterganam* v. *Tayyan Nayar.*[1] Such Nambudries will, therefore, satisfy the exception.

1, (1903) 14 M. L. J. 214.

If Nambudries can, under the law in Malabar, validly contract *Sambandham*, we do not see any reason why they should not come under the Bill and be declared as such. We also think that the Bill should carry out the consequences flowing from such declaration and declare the children born of such marriages to be legitimate with all the consequences flowing from such legitimacy under the Hindu Law. If it is said that the Nambudri or other person who contracts such *Sambandams* and is allowed by other members of his family to contract such *Sambandams* will object to the declaration of legitimacy we have no hesitation in thinking such objections to be unreasonable and inequitable in the interests of the off-spring. It cannot be that the objection to declaring the offspring to be legitimate is on any religious, moral or legal ground. Under the Hindu Law texts marriages among members of different classes (though not in the inverse order) were perfectly valid and legal and the children born under such marriages were legitimate and had certain rights. Such marriages have become obsolete in Northern India and in the East Coast. But among the Brahmins of the West Coast chiefly among the Nambudris many other practices allowed by the sacred texts but since become obsolete in the East Coast still prevail. This practice of Nambudri Brahmins contracting Sambandams with Nair ladies is apparently on the basis of the texts allowing marriages among members of different castes. If there is a valid union created between the Nambudri Brahmin and the Nair lady by the *Sambandham* then there can be no objection whatever to the offspring of such union being regarded as legitimate. If, however, it is not a valid union it is immoral and we think a declaration that it is such, is perfectly reasonable and the sooner it is done the better it is in the interests of morality. The Nambudri cannot for the purpose of satisfying his conscience regard the union erected by the *Sambandam* as valid and moral but regard the offspring arising from such union as otherwise than legitimate.

We cannot, therefore, understand the scope of the exception to S. 11 of the Bill. S. 11 applies only to a person governed by this Act. The persons governed by this Act are according to S. 1 cl. (b) the followers and the descendants of such followers of the Marumakkathayam or Aliyasanthana law. They cannot be said to be persons who have a personal law of marriage within the exception and they do not come within the scope of the section at all. As regards the descendants of the followers there may be two classes. They may be (1) descendants of persons contracting *Sambandams* both parties to which are followers of Marumakkatayam or Aliyasantana

Law or (2) they may be descendants of persons contracting *Sambandams* one party to which is governed by Marumakkatayam or Aliyasantha Law while the other is not governed by such law but by some personal law. The Act does not declare by what law this latter class of descendants is governed. Are they to follow the law of their mother or the law of their father? A similar question has arisen in the case of Moplas. We must say that the decisions of our High Court on this question are unsatisfactory and no consistent general principle can be evolved from them. We may have to discuss the cases on this subject on a future occasion. It is far better that the Act specifically enacts some provision relating to this. Upon general principles and upon the analogy of principles prevailing in other systems of law we think that a declaration that such descendants of the 2nd class are governed by the law of their father is only proper and reasonable. That of course will not prevent such descendants claiming interest in their mother's property or in their mother's tarwad. If it be said that the exception refers to the case of Mopla Mahomedans who are governed by Marumakkatayam law we cannot understand why there should be this exception and the further exception to the exception so far as the husband is concerned.

A writer from North Malabar whose article we publish in this journal in the next issue thinks that the author of the Bill forgot altogether the Moplahs of North Malabar. Be this as it may we think the language of the several provisions of the Bill requires considerable modification.

NOTES OF INDIAN CASES.

The Special Officer Salsette Building Sites v. Dossabhai Bezonji Mottiballa.—I. L. R. 37 B. 506.—In this case their Lordships of the Bombay High Court hold that an appeal does not lie to His Majesty in Council from the decision of the High Court on appeal under S. 54 of the Land Acquisition Act. Their Lordships followed the recent decision of the Privy Council in *Ranjpon Botatoung Company Ltd.* v. *The Collector of Rangoon*[1] which was a case relating to an appeal from the Chief Court of Lower Burmah. In a note on this Privy Council case a view was expressed in the columns of this journal that the decision of the Privy Council negativing the right of appeal to the Privy Council in Land Acquisition cases should be confined to the case before their

1. (1912) I. L. R. 40 C. 21.

Lordships. The Bombay High Court would seem to think otherwise and reserve to the Privy Council the right of distinguishing its former decision. We thought that the decision of the Privy Council should not be taken as negativing the right of appeal from the decision of a High Court or other Court of final appellate jurisdiction under S. 54 of the Land Acquisition Act and if the Privy Council has decided it otherwise we should think that it is wrong. The Bombay High Court considers itself to be bound by the decision of the Privy Council and we find that their decision is supported by the decision of the Privy Council when this case was taken before it. See *The Special Officer Salsette Building Sites* v. *Dasabari*[1]. The matter is therefore concluded by the highest judicial authority and it would serve no useful purpose to show how their decision is wrong. It is, however, highly necessary that there should be an appeal to the Privy Council and that the Legislature should intervene by inserting such a provision in the Land Acquisition Act.

Srinivasa Sarjerar v. Balwant Venkatesh.—I. L. R. 37 B. 513.—We agree with the decision of the Bombay High Court that the decision of the Privy Council in *Tribuvansingh* v. *Rameshwar Batt*[2] is not conclusive on the question of limitation as to the applicability of article 118, but in the view of the finding of the judges that the adoption was valid no question of limitation would arise and their decision is only *obiter*. We cannot, however, agree that the Bombay view is correct but apparently the question seems to have been concluded there by a decision of the Full Bench in *Srinivas* v. *Hanumant*[3]. There can be no question that under articles 118 and 119 of the present Limitation Act the Full Bench decision of the Bombay High Court will have no application.

Karibasavana v. Veerabhadrappa.—25 M. L. J. 3. The point raised in this case is one of first impression in this country and so far as one is able to see there is no English authority either on the point. Plaintiff's right of way was obstructed. He claimed damages for the loss of crops on the land which he said he had to keep waste in consequence. It was found that another route though circuitous and somewhat hazardous was available. The question was: whether he ought to have availed himself of that route and avoided the damage? The question as put is open to the obvious answer that he owed no duty to the defendant. But their

1. (1913) 17 C. W. N. 421.
2. (1906) I. L. R. 28 A. 727.
3. (1899) I. L. R. 24 B. 260.

Lordships (*Sundara Aiyar* and *Sadasiva Aiyar* JJ.) point out that the basis of the rule as to avoiding or mitigating damage is not any duty owed to the wrong-doer but the fundamental principle common alike to contracts and torts viz., that the damage must be the direct and natural consequence of the wrong. A consequence which is avoidable cannot be said to be the direct and natural result of the wrong. If another route though more circuitous was available, the loss of crops was not the direct and natural consequence of the obstruction by the defendant. Their Lordships, accordingly, restricted the plaintiff's claim to the extra costs to which he might have been put if he had taken the circuitous route and in addition to some amount as compensation for affecting the evidence of his right. This decision extends a rule the application of which to contracts is undoubted, to torts as well,

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Parameshwara Pattar *v.* **Sridevi**.—25 M. L. J. 51.

The question in this case was whether an admission by the principal as to the amount of his liability (as agent) was evidence against the surety. Their Lordships *Sundara Aiyar* and *Sadasiva Aiyar* JJ) held it was. Reading S. 19, Evidence Act and the illustration, their Lordships' view seems to be obviously right, though the English law is different. In a subsequent case (*Appavu Chettiar* v. *Nanjappa Goundan*[1]) *Tyabji* J. finds difficulty in accepting this decision as sound. His Lordship's difficulty is this. S. 19 only says that the statement is an admission. Its admissibility must be tested by reference to S 21. An admission is under that section available only against the party making it or his representative and in favour of him only under special circumstances. The surety being neither the party making the admission nor his representative, the admission is not evidence against him. The result of this construction is an obvious failure of the intention of the legislature. But, with deference, his Lordship's view proceeds upon a wrong reading of S. 21. That section makes all admissions relevant. It goes further and says that an admission can always be proved against the party making it but that in favour of the party making it, it cannot be proved except in special cases. It does not say that an "admission" by a third party, provided of course it is an admission within the meaning of the Act, cannot be proved against a party to the suit. Being relevant and there being nothing in the Act to prevent its being proved it can be proved and would be available in evidence. The reason why S. 21 does not refer to

1· (1913) 25 M. L. J. 329.

cases coming within S. 19 is that the necessary restrictions are laid down in that section itself. Unless the section is read in the way suggested, there is also difficulty in making the admission of a person evidence against his co-owner as it undoubtedly is under the English law and was intended to be under the Indian (vide S. 18 Evidence Act.) Another reading of the section which finds favour with Messrs. Ameer Ali and Woodroffe is to give the words "against the party making the admission" an extended signification by reference to Secs. 18 to 20. Either view disposes of his Lordship's objection and seems to be necessary to avoid the intention of the legislature being frustrated.

SUMMARY OF ENGLISH CASES.

Davis v. Marrable: [1913] 2 Ch. 421.

Light—Obstruction to—Raising buildings in one direction and lowering in another—Net result, beneficial—Good defence.

In defence to a suit for damages for obstruction of plaintiff's light by raising the height of the defendant's buildings,it was contended that another part of the building had been lowered and as a result though the amount of light in one direction was diminished the amount of light from another direction was increased and the net result was favourable to the plaintiff. *Joyce* J. held that this was a good defence. His Lordship said that the case was not analogous to the case where the light the defendant relies upon as making his interference harmless is a light to which the plaintiff is not entitled as a matter of right and which might be taken away with impunity. The defendant having pleaded the existence of the light in question as a bar to plaintiff's action would not be permitted later on to justify his interference with that light on the ground that plaintiff had not acquired a right to it.

Lord Ashburton v. Pope: [1913] 2 Ch. 469.

Confidential communication—Right of the owner to prohibit use of original or copy—Admissibility in evidence, no defence to suit to restrain use.

The fact that a party has surreptitiously come by a document is no bar to its being admitted in evidence if otherwise it is admissible; vice versa, the fact that a document is admissible in evidence is no answer to a claim by the owner of a confidential communication to restrain its being published or copied.

In this case the defendant by a trick managed to secure letters from the plaintiff to his solicitor of which he took copies. Plaintiff sued to restrain the defendant from disclosing the letters or the copies. Defendant wanted to use the letters or the copies in Bankruptcy proceedings instituted against the plaintiff. They would have been very relevant in those proceedings. Defendant asked the Court not to restrain him from using them in the Bankruptcy proceedings. *Neville* J. complied with his prayer. *Held* the order of the learned judge was wrong and the injunction was to be absolute and without any exemption.

In re **Cozens Green** v. **Brisley** [1913] 2 Ch. 478.

Declaration of trust—Evidence of—Communication—Effect of—Want of entries in private accounts—Security for past debt—Voluntary—Imperfect security—Court will not help to perfect.

Where a trustee has committed default but is subsequently said to have made up the breach of trust by appropriating other securities to the trust, the question is whether he has made an irrevocable declaration of trust which is a question of fact.

In this case, the Court refused to draw that inference from mere entries in the private accounts of the trustee which were not communicated to anybody.

The fact that the appropriation is not communicated raises a strong presumption against intention to make an irrevocable declaration of trust. The inference is that silence was intended to enable the declarant to adhere to or abandon the declaration as best served his advantage for the time being.

Where security is given for a past debt it is purely a voluntary act and the Court will not assist the creditor if his security is *imperfect*.

In re **Mayall Foley** v. **Wood** [1913] 2 Ch. 488.

Will—Construction—Legacy—Misdescription.

A testator gave as legacy his "two freehold cottages, situated at Trowbridge, known as 19 and 20, Castle Street" The testator had no cottages in Castle Street though he did own two cottages, Nos. 19 and 20 in Thomas Street. He had no numbers 19 and 20 in Trowbridge other than those in Thomas Street. *Held* that it was a case of misdescription and the legatee was entitled to 19 and 20 Thomas Street.

Sobey v. Sainsbury: [1913] 2 Ch. 513.

Restrictive covenant—Defence to suit on—Altered circumstances—Plaintiff's and his predecessor's default.

In an action to enforce the restrictive covenant in a building scheme, it was pleaded for the defence that the plaintiff and his predecessors in title themselves had broken the covenant; secondly that the character of the neighbourhood had so altered that it would be unconscionable to enforce the covenants, *Sargant* J. held that both these were good defences and dismissed the plaintiff's suit. His Lordship held following the opinion of *James* L. J. and *Lindley* L. J. in *Erman* v. *Chapman*[1] and *Knight* v. *Symmonds*[2] that alteration of circumstances was a good ground for refusing specific performance whatever the explanation for the altered state of things might be whether it was the plaintiff's default, or for the matter of that, that of the defendant not objected to by the plaintiff.

Teofani and Co., Limited v. A. Teofani: *In re* Teofani and Co.'s Trademark: [1913] 2 Ch. 545 (C. A.)

"Passing off" action—Intent to deceive—Proof of person deceived not essential—Fraudulent use of name—Prohibition of—Bona fide use permitted—Trademark—Surname—Registrable if distinctive.

There is nothing to prevent a person who is setting up a trade in which there are already others of the same name from using his own name but alike from the legal and from the moral point of view a person is forbidden to use his own name in connection with the goods in such a way as to represent that the goods are the goods of somebody else of that name. If he does that, he is acting fraudulently and the court will restrain him. The court will restrain the fraudulent use of a man's name as much as any other fraud.

To succeed in an action brought for the purpose, it is not necessary to prove that anybody has been in fact deceived. It is quite sufficient if the Court comes to the conclusion that it is calculated and intended to deceive or apart from any intention to deceive, that it is calculated to deceive.

1. (1877) 7 Ch. D. 271.

2. (1896) 2 Ch. 294.

Under the Trademarks Act a surname is registrable provided it is distinctive. But that would not prevent any person from bona-fide making use of his own name for any purpose.

In re **Marke Wood, Senior:**
In re **Marke Wood Junior, Wodehouse *v.* Wood:**
[1913] 2 Ch. 574 C. A.

Will—Construction—Referential trust—Three separate trusts —Hotch pot clause.

A testator gave three funds, one to each of his three children on trust for each child for life, on his death to such of his or her children as he or she shall appoint, in default of appointment to the children equally with a clause that if there was an appointment to any extent in favour of any of them, the portion appointed should be brought into the hotchpot. In each case there was a direction that in the event of failure of issue, the fund should go to the issue of the other children. A granddaughter of the testator became entitled to one fund by appointment, and to a portion of the other fund under the gift over. The question was whether she was bound under the hotchpot clause to bring into hotchpot the amount she got by appointment. *Held*: not. The appointment being in respect of quite a separate fund, it did not come within the hotchpot clause.

In re **Beavan: Davies, Banks and Co. *v.* Beavan:**
[1913] 2 Ch. 595.

Executor—Retainer—Surety of testator—No right of, before payment—Restricted to debts—Opportunity to pay and secure right of retainer, permissible.

The question in this case was whether an executor could retain for a debt due from the testator for which the executor was a surety. The executor had not paid the debt when he claimed the right to retain. The estate was in the hands of a receiver appointed in the administration action brought by the creditors.

Neville J. held that he was not entitled.

The right of an executor to retain is a purely legal right which has been recognised in equity so far as it existed in law and no further and has never been extended to equitable claims except so far as they were equitable rights recognised and given effect to by a proceeding at law. The right of the surety was not such a right.

His Lordship was inclined to grant the executor an opportunity to pay up the debt and then plead his right of retainer but as this right could be exercised only in respect of assets in his hands at the time he pays the debt and there were no such assets in this case, his Lordship thought it futile to accede to the prayer.

In re **Seaton: Ellis v. Seaton**: [1913] 2 Ch. 614.

Will—Construction—To E for life or until she gets legacy—Terminable life estate—Reference in will to gift of legacy and income—Insufficient to enlarge estate.

A testator gave a 4th of his residue to his daughter E during her life or until she should receive the legacy under her father-in-law's will, and provided that then the 4th share and the income bequeathed to her should fall into the residue and be distributed in a particular manner. E did not get the legacy, the estate of the father-in-law having turned out insolvent. *Held*: that the words occurring in the last clause were not sufficient to confer on the daughter more than a terminable life estate; that the gift over took effect though E's estate did not terminate in the manner contemplated but by her death.

In re **Atkins: Life v. Atkins**: [1913] 2 Ch. 619.

Merger—Life estate—Fee simple defeasible on death without issue—Transfer of life estate to owner of—Effect of.

There was first a gift to A the testator's widow for life—the remainder to B her son in fee with an executory gift over to C if B died unmarried during A's life. A conveyed her life interest to B, but B dying unmarried, the question arose whether the gift over took effect immediately or whether it could come into effect only on the death of A. Held per *Eve* J. no precaution having been taken to keep A's life estate intact, there was a merger and the gift over took effect on the death of B.

In re **Pearce: Alliance Assurance Company v. Francis**: [1913] 2 Ch. 674.

Will—Construction—"Children"—"Illegitimate children"—Inclusion of—In the absence of legitimate children or when words in the will, require.

A testatrix left a legacy to the children of her brother. The brother had at the date of the will and also at the death of the

testatrix 8 children, 6 of whom were illegitimate and 2 legitimate. The mother of the illegitimate children was known and accepted in society as the wife of the brother and the testatrix also knew the children and was even fond of them. Under these circumstances the question was whether the illegitimate children were entitled to participate in the legacy. Held per *Sargant* J. not.

The word "children" means only "legitimate children;" the only two ways in which the significance of the term can be enlarged are first by showing that there are no legitimate children to whom the description can or could apply; secondly by showing from the expressions used in the will itself that illegitimate children also must be meant. When there is nothing in the will itself to show that illegitimate children are intended to be included and there are legitimate children to satisfy the terms of the will, it is not open to enlarge the significance of the term by reference to extraneous circumstances.

North Western Salt Co. Ltd. v. Electrolic Alkali Co. Ltd.
[1913] III K. B. 422 (C A).

Contract—Restraint of Trade—Breach of—Action for damages—Illegality not pleaded—Duty of Court.

The plaintiffs entered into a written contract with the defendant for the purchase of salt manufactured by them. The contract was found to be illegal as being in restraint of trade. In an action for damages for breach of contract the defendants failed to set up the illegality of the contract as a defence to the claim. Held :—that it was not necessary that the defence of illegality should be pleaded the Court being bound to deal with the illegality which was apparent on the face of the contract.

Charing Cross West End Electricity Supply Co. v. London Hydraulic Press Company. [1913] III K. B. 442.

Nuisance—Different Companies laying mains under streets—Damage to electric cables by hydraulic mains bursting—Statute—Construction—Two Acts to be construed together.

Plaintiffs a Company supplying electricity had laid their cables under certain public streets. The defendants were the owners of hydraulic mains containing water which had been laid under the same streets under statutory powers. The hydraulic mains burst in four different places and caused damage to plaintiff's cables.

There was no negligence on the part of defendants. Two of the mains which so burst had been laid under an act which did not contain the usual clause that nothing contained therein should exempt the company from liability for nuisance. The other two were laid under a later act which did contain such a clause and which also provided that the two Acts should be read and construed together. *Held* :—In an action to recover damages or alternatively as for nuisance that the doctrine of *Rylands* v. *Fletcher* applied not only to cases where the dangerous thing has escaped from defendants' land into plaintiffs' and caused damage to plaintiffs' land but also where plaintiff occupies land under a license and not under any proprietory right in the soil. *Held* :—that notwithstanding that the defendants had not been guilty of negligence, in the absence of statutory authorisation of the nuisance they were liable to pay damages. *Held* further that the effect of reading the two Acts together was to take away the privilege of not being liable for damages done by the bursting of the main in the absence of negligence and they were liable for nuisance.

Wootton v. Sievier [1913] III K. B. 499 (C. A.)

Practice—Discovery—Libel—Plea of justification—Particulars—Application for better particulars—Principles.

The plaintiff owner and trainer of race horses sued the defendants for libels alleged to have been published by them. The meaning of the publications was that the plaintiff had been guilty of gross dishonesty in the training and running of racehorses, and particularly that he conspired with other trainers and jockeys to defraud bookmakers and owners of racehorses and the public generally. The defendants pleaded an unqualified justification for the alleged libels and under a Judge's order delivered particulars of the matters of justification mentioning the number of races, jockeys and horses with the weights carried by them and names of certain trainers: The plaintiff applied for better particulars of the betting transactions which he was accused of having entered into contrary to his honour and duty. The Judge refused to order. On appeal,

Kennedy J :—stated the principles applicable to the case thus: "In every case in which the defence raises an imputation of misconduct against him. the plaintiff ought to be enabled to go to trial with full knowledge not merely of the general case he has to meet but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation ". " Further as a

general rule it is now established, that, if particulars are such as the defendant ought to give he cannot refuse to do so merely on the ground that his answer will disclose the names of persons whom he may intend to call as witnesses at the trial." At the same time on an application by the plaintiff for particulars or for further and better particulars the Court before acceding to it must be careful to see that the demand is not of a vexatious or oppressive character or the material facts being pleaded in this statement of defence with sufficient precision to enable the plaintiff to know and to prepare himself to deal with them, that the plaintiff is not correctly endeavouring to get something more to which he is not entitled i. e., the disclosure of evidence in defendant's possession.

JOTTINGS AND CUTTINGS.

Comments on Judges.—It is reported of Mr. Justice *Hutton*, one of the judges who supported the action of John Hampden in the Ship-Money case, that shortly after the trial one Harrison 'a Batchelor of Divinity and Parson,' came into the Court of King's Bench, where the judge was sitting, and said, 'I accuse Mr. Justice *Hutton* of High treason.' He was duly indicted in the King's Bench, fined five thousand pounds to the King, and on a bill of indictment ordered to pay the further sum of ten thousand pounds as damages to the judge himself. That was an extreme instance of the exercise of the Court's power to protect its members from attack, and in more modern times it has been recognised that even the power to commit summarily for contempt ought not to be used for the vindication of the judge as a person; tor comments made upon him which do not interfere with his administration of justice in a pending case 'he must resort to action for libel or criminal information' (per Lord *Morris* in *McLeod* v. *St. Aubyn* [1899]. Mr. Justice *Avory* has somewhat extended the doctrine of a judge's freedom from criticism, even in a pending case, by suggesting that if certain comments which were alleged to have been made about him by counsel engaged in the case to their own client had really been made, he would have ordered a settlement between the parties to be set aside on that ground alone, apart from any question as to the authority of Counsel to effect the settlement (*Hay* v. *Olivier*, November 7). The statement imputed to Counsel by the aggrieved lady client who tried to make it a ground for re-opening the case was that she must agree to a compromise because the learned judge was one who would never listen to anything against an official—the defendant in the case was a former

Governor of Jamaica. But it was just as incredible that any responsible counsel could have used such an argument as it was that the judge himself should have had any such prejudices. Mr. Justice *Avory* preferred, however, to treat the matter seriously, and only dismissed the lady litigant's application after hearing full statements of the actual facts attending the compromise and formal repudiations from the Counsel concerned from their places at the Bar. We doubt whether this was necessary, but we should not like to accept the view that, even if the statements had been made, they would have furnished ground for the re-opening of the case against the other party to the settlement.—1913 *Law Journal p. 654.*

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The Privy Council and the Dominion.—That Imperial maid-of-all-work, the Privy Council, has more than once had to consider whether a tax imposed by a Provincial Legislature in the Dominion of Canada was unconstitutional, as not being direct taxation to raise revenue for provincial purposes, within the meaning of the British North America Act, 1867, S. 92. For the determination of the question when taxation is direct and when indirect, the Judicial Committee has at times turned itself into a School of Political Economy and discussed the theories of the leading authorities on the science. In the result they adopted John Stuart Mill's definition of a direct tax as 'one which is demanded from the very persons who it is intended or desired should pay it,' as distinguished from indirect taxes, which are 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.' The law of Quebec has imposed a succession duty as part of the Provincial Revenue, and in *Cotton* v. *The King*, an appeal from the Supreme Court of Canada, the Judicial Committee decided on Monday that the duty was not direct taxation, and that the enactment which imposed it was, therefore, *ultra vires* on the part of the Provincial Government. It seems fairly obvious, indeed, that the persons from whom succession duty is obtained, viz., executors or administrators, are not intended to bear the burden themselves. They indemnify themselves at the expense of the beneficiaries. If the legal point in dispute is not one of much interest, the case in its broader aspect suggests a reflection not unworthy of consideration at the present time. No better tribunal for the determination of a constitutional question can be imagined than the body of distinguished jurists who sit in Downing Street, far removed from the political influences that may prevail or the passions that may have been aroused in the colony where

the question arose. If Lord Haldane's dream of an Imperial Assize were to be realised it would be necessary at least to provide that cases involving constitutional issues should, as heretofore, be heard in the capital of the Empire.—*Ibid p. 655.*

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Contracts 'Implied' in Law and by Inference.—A rather fine distinction is raised in our law between contracts which are 'implied in law' from circumstances independent of agreement and contracts which arise from an inference of fact and only differ from express contracts in the form of proof. They are both called 'implied contracts,' but in the former case the promise implied is a mere fiction of the law created to give effect to obligations arising out of equitable considerations ; in the latter the promise is an implication of fact based on circumstantial evidence, and although the proof is different the legal consequences are the same as in an express contract. A case which brings into sharp relief the nature of the distinction between these two classes of implied contracts has just been decided by the House of Lords in an action in which builders who had erected a picture theatre declined to recognise the claim of a firm who had supplied door furniture for the theatre on the orders of the architect, on the ground that the architect was not their agent, and that the payments which they had received from the building owner, on the architect's certificates, were properly attributable to other items in the contract (*Ramsden & Carr* v. *Chessum* & *Sons*, November 10). The plaintiffs sued as for the price of goods sold and delivered on the orders of the architect, or in the alternative on an implied contract to pay as for money had and received to their use or held in trust for them, and Mr. Justice *Hamilton,* who first tried the case, found that their claim could not be supported on either of these grounds. But he also held that, in the circumstances of the case, the fact that the goods were used by the defendants raised an implied promise to pay for them, and he accordingly gave judgment for the plaintiffs. The Court of Appeal by a majority (Lord Justice *Kennedy* dissenting) reversed this decision, holding that the circumstance that the goods were used by the defendants raised no implied contract in fact, and as there was also no implied contract in law arising from the receipt of instalments from the building owners, the claim altogether failed. In face of this equal division of judicial opinion the House of Lords has now unanimously decided that, in the words of the Lord Chancellor 'if A brings goods to B, to be used upon work which B is doing, and B knows that those goods are not brought as a gift, but are

meant to be paid for, and B then uses the goods upon his works, the inference to be drawn from these facts is that there was an implied promise on the part of B to pay for the goods.' As thus stated the case seems fairly simple and the conclusion obvious. It is arrived at by an implication of fact, and there is no need to invoke the fiction of a contract implied in law to arrive at a result so consistent with natural justice.—*Ibid p. 655.*

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The Court of Criminal Appeal.—Three interesting practice points came before the Court of Criminal Appeal on Monday. The most important was that of *Rex* v. *Young*, the appeal of a prisoner who had been convicted as a 'habitual criminal' and sentenced to the unusually long term of ten years' preventive detention by the Deputy Chairman of London County Sessions. Mr. Lawrie, in summing up, had told the jury that the point for them to consider, there being numerous previous convictions proved, was whether the prisoner when he last came out of prison had made up his mind to lead an honest life. If he had not done so, then they were at liberty to convict him of 'persistently leading a dishonest and criminal life' within the meaning of the Prevention of Crime Act, 1908, S. 10 (2) (*a*). Now, this direction threw upon the prisoner the onus of proving that he was not a habitual criminal. It was defended before the Court of Criminal Appeal on the ground that the proof of three statutory convictions and numerous others prior to prisoner's last conviction was *prima facie* evidence that he was persistently leading a dishonest and criminal life; the burden of rebutting was then shifted upon the prisoner. There are indications in some of the earlier judgments of the Court of Criminal Appeal (see *Rex* v. *Waller*, 3 Cr. App. R. 213; *Rex* v. *Kelley*, 3 Cr. App. R. 248; *Rex* v. *Everitt*, 6 Cr. App. R. 267), that this view at one time seemed likely to commend itself to the Court; but all such *obiter dicta* have been overruled by the strong pronouncement on the point made by the present Lord Chief Justice a fortnight ago in *Rex* v. *Brown*) 'The onus of proof' he said, 'in that case has been imposed by the Legislature on the prosecution and must be strictly complied with in every case.' Again, the phrase 'is persistently leading,' he pointed out, shows that evidence of a guilty life cannot be inferred merely from continuous conduct in the past; there must be new evidence of dishonest ways covering the period just prior to the latest offence, that to which the second count is appended. Mr. Lawrie's direction clearly infringed those principles which the Lord Chief Justice once more emphatically re-affirmed as essential and therefore the conviction was quashed.

A question as to sufficiency of evidence was raised in *Rex* v. *Frederick Albert Robertson* (November 11). The prisoner had been convicted at the Central Criminal Court of murdering his three children. In June last the prisoner's wife was taken ill and removed to the infirmary. The prisoner tried in vain to get his children looked after during her illness by a hired person, by the relieving officer, and by the Salvation Army. Then they disappeared and were never seen again. On July 25 bodies in so advanced a state of putrefaction that they could not be identified were found buried in a cellar under the appellant's house; but the medical evidence pointed to death by suffocation. The prisoner had accounted for the disappearance of his children by a series of stories which were pure invention. It was contended for the prisoner that some overt act on the part of the prisoner pointing to murder by him must be proved in order to convict. The Court, however held that such overt act is not necessary: the purely circumstantial evidence was enough to justify the jury's verdict.

The third case (*Rex* v. *Samuel Booker*) raised the point how the Court ought to treat an appeal against a sentence where the prisoner desired an increased sentence. The facts were quite peculiar. The appellant, convicted at Northumberland Sessions on charges of larceny and burglary, had been sentenced to 12 months' hard labour. In prison he became converted and desired to reform but feared that his good resolutions would give way under renewed temptation if he were released before the habit of steady work had become confirmed. He therefore asked for a sentence of penal servitude. The Court, however, held that the severity of a sentence is a matter of public policy, and that the wishes of the prisoner cannot be considered by the Court of Criminal Appeal. The only question for it is whether the sentence was a proper one. There being nothing improper in the present sentence, the appeal was dismissed.—*Ibid* p. 650.

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BENCH AND BAR AT THE GUILDHALL.

THE LORD CHIEF JUSTICE'S SPEECH.

The Lord Chief Justice, responding on behalf of the Bench to the toast of 'The Judges and the Bar of England' at the Guildhall banquet, said:—You will, I am sure, forgive me if, before I say a word on behalf of my brother judges, I give utterance to two thoughts which are foremost in my mind at this moment, when I stand here, in this historic hall of the ancient City, and address you in response to the toast so felicitously proposed. The first is that

I count it indeed fortunate, and, may I say, appropriate, that my first public utterance outside the Courts of Justice should be made here in the City—bound as I am to the City by memories of my early youth, my early association and training; and remembering, as I do, that much of what has stood me in good stead in my life in later years was learnt in the City and amongst business men. The second is, you may perhaps think, a little more irrelevant, but I am in my infancy as a judge, and, therefore, you must forgive me if I stray a little into irrelevancy. I cannot address you here to-night in the City without recalling that I should not be here, occupying this position at this moment, if it were not for the great struggles of the City—now so many years ago—in the cause of the religious liberty. I should be ungrateful indeed if I allowed this opportunity to pass without reminding you that, first of all, it was the City that insisted upon members of my community being members of your Corporation. And it was the City that led the struggle for representation, again, by members of my community in the House of Commons. If I have strayed for a moment into those paths which, perhaps, are not peculiarly appropriate for the toast to which I am responding, it is because I should think that I were false to everything that is within me if I did not give utterance to these sentiments, remembering as I do that memories so quickly fade, and that, where a whole nation now agrees that there should be the fullest religious liberty and toleration, that was not the case when the City fought the battle which placed me here. I am privileged to speak for the judges. I know them from my observation at the Bar more than in my association with them as judges. I know them from practising before them for so long, and it is, perhaps, for that reason that I may respond for them with less restraint, as I am accustomed, or have hitherto been accustomed, to take my place at the Bar, where there was greater freedom of expression, where impartiality was not a virtue, and silence was not golden. Now, in the very fact of which I am an illustration, at the Bar yesterday, on the Bench to-day; at the moment fighting with or against opponents at the Bar, who never become enemies but only opponents, and the next either addressing them or being addressed on the Bench; where we know all their qualities; where, when I was at the Bar I used to say I knew their defects, and where, now I am on the Bench, though I am sure I shall not hear it, I know there will be many at the Bar who know my defects. In responding for the judges, I am privileged to say, from the little that I have yet seen, that it is indeed an honour to associate with them in the dispensation of justice. My predecessor, Viscount Alverstone, to whom

so eloquent a tribute was paid recently by the Lord Chancellor and the Attorney-General, was a man who devoted, not only the best of his abilities, but the best of his strength, to furthering the cause of justice. He never spared himself, he never learned the meaning of economising his forces. Although I would not for one moment presume to add anything and could not add anything, to what was so well said on a recent occasion, I may be permitted to say—coming straight as I do to-day from the Court of Criminal Appeal, over which he presided in the early days, and in which he did such excellent work, and in which he was so well and ably assisted by his brother judges—that I am quite sure that this Court, which in my humble judgment does such excellent work, was one to which Lord Alverstone devoted the best of his abilities and energies. Whatever his views may have been as to the necessity for the Court, from the moment that the Act of Parliament was passed, he laboured unwearyingly and unremittingly to make it a success, and to make it a Court to which everyone would come with the absolute conviction and certainly that, as far as it was possible with reference to any human being, justice would be administered there with one single purpose, namely, that of doing right. I might be tempted to indulge in some speculation as to what the result of the Royal Commission which His Majesty appointed to inquire into the causes of delay in the King's Bench Division, but I shall not attempt to do so. I am quite certain that that Commission will have laboured to produce recommendations which we shall consider with the utmost respect—recommendations and views which I know that my brother judges will attempt, not only to consider, but to give effect to if possible—and that the only view which they would put forward at this moment is that the judges of England are animated by one single purpose—to serve the highest public interests of the State, and to do what in them lies to promote the course of justice, and in that way to do good and satisfy the public demands of the community. I know very well it is easy to criticise judges, but it should always be remembered that it is the function of the judges who preside in the Law Courts to interpret the laws and administer them, and that they must leave the function of making the laws to Parliament, which is responsible. Perfection can never be attained by human beings, but we can labour, as I believe we have laboured, and as I am sure judges will labour in the future, to make justice swift, and yet not hurried—for justice in haste, is, in my opinion, justice in jeopardy. Above all, whilst administering justice and passing judgment upon actions of men we shall always remember that justice is never less in peril than when it is tempered by mercy.

The Attorney-General, in responding to the toast on behalf of the Bar, said that the profession for which he spoke was, of all professions, the most constantly misunderstood. There were still some deluded persons who regarded a barrister as one who learned his living by fomenting strife and who took peculiar pleasure in bamboozling juries and misleading judges by the exercise of acumen almost diabolic, stimulated by the payment of fees entirely extortionate. In every particular that picture was untrue. So far from strife being promoted by the practice of advocacy, more quarrels were settled, more controversies were closed, and more reconciliations were effected within the boundaries of the Temple and of Lincoln's Inn than in the whole of the United Kingdom besides. This country had evolved a system by which judges, who were themselves trained at the Bar, expected to receive from the advocates who practised before them the contentions appropriate to the case presented with fidelity to their clients, with fairness to their adversaries, and with candour to the tribunal itself. That was why barristers claimed, in some measure, themselves to be the instruments of justice. That was why, by the ancient tradition of that banquet, the Bench and the Bar were coupled in a single toast. That was why he was so proud to respond for that great profession, and doubly proud on an occasion when he shared the responsibility of replying with one who was for three years his colleague and his chief, and whom to-day the whole Bar of England acclaimed as the chief of the permanent Judiciary of the land.—*Ibid* p. 661.

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The Bar and the Empire.—While the number of admissions to the solicitors' branch of the profession shows a tendency to decline —the Council of the Law Society pointed out in their latest report that the number of admissions in 1912 was sixty-three fewer than in 1902—the number of calls to the Bar is increasing. This term 119 students have been called—35 at the Middle Temple, 33 at the Inner Temple, 27 at Lincoln's Inn, and 24 at Gray's Inn. This growth in the membership of the Bar does not mean an increase in the competition in our Courts. It is attributable to the larger number of students who come to the Inns from the King's dominions beyond the seas. More than one-third of the newly-called barristers bear names that unmistakably indicate that they belong to other climes than ours. The Inns of Court, like the Judicial Committee, may thus be regarded as a link of Empire, and any action by which the link is weakened will be a misfortune both from the Imperial and professional point of view. If any of the students

who come from remote parts of the Empire to qualify for the Bar desire to remain here after they are called, no obstacle ought to be placed in their way of pursuing the profession to which they have been admitted. A little time ago a Circuit mess declined to elect an Indian gentleman merely because of his complexion. Such a discrimination if generally maintained—and we are glad to say that it has not been—would be wholly unworthy of the traditions of the Bar, and might prove to be seriously prejudicial to the interests of the Empire.—*Ibid* p. 666.

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Literature and Lawyers.—Lawyers, it may freely be admitted have fared rather badly at the hands of literary men. Even Dickens, who is supposed to have had a liking for the legal profession, did not draw very likable lawyers. But it is not difficult to exaggerate the abuse which some literary men, especially writ-harried poets, have heaped upon all legal heads, and Mr. Leslie Scott, K. C. M.P., who at the annual dinner of the Solicitors' Managing Clerks' Association challenged anyone to produce from English literature a quotation laudatory of the lawyer, did not escape the temptation to take too gloomy a view of the relations of literature and law. A quotation from Crabbe, who wrote at a time when lawyers were generally held in far less regard than they are at the present time, is a sufficient answer to Mr. Leslie Scott's challenge. While ' Pope in worsted ' drew Swallow, whose office he compared to a spider's web in which the ' hard, bad man ' peered about for ' fat, intruding flies' he made amends by drawing another attorney in these sympathetic lines :—

Yet, I repeat, there are who nobly strive,
To keep the sense of moral worth alive ;
Men who would starve ere meanly deign to live
On what deception and chican'ry give ;
And these at length succeed ; they have their strife,
Their apprehensions, stops, and rubs in life ;
But honour, application, care and skill
Shall bend opposing fortune to their will.
Of such is Archer, he who keeps in awe
Contending parties by his threats of law ;
He, roughly honest, has been long a guide
In Borough business, on the conquering side,
And seen so much of both sides, and so long,
He thinks the bias of men's minds goes wrong:
Thus, though he's friendly, he is still severe,
Surely though kind, suspiciously sincere.
So much he's seen of baseness in the mind,
That, while a friend of man, he scorns mankind.

Laudatory lines from more recent writers might be given, but this admirable sketch of an old attorney will suffice. Mr. Leslie Scott who forgot George Crabbe when he made his challenge, may be comforted to learn that lawyers have not been painted quite so black in literature as he supposed them to have been.—*Ibid* p. 667.

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The Crime of Blasphemy.—Attention was drawn by Mr. Justice Coleridge to a curious *lacuna* in our law of blasphemy in *Rex* v. *Stewart* (November 17). The offence is one both at Common Law and under a statue but in neither case does it appear to be any crime to attack a religion other than the Christian, no matter how gross and indecent the attack. The Common Law offence is committed by anyone who either (a) denies the existence of God, or (b) denies the truth of Christianity (1 Hawkins' Pleas of the Crown c. 5); it is a Common Law misdemeanour, and, like all such misdemeanours, not punishable with hard labour. The statutory offence, under 9 William III., c. 35, makes it an offenee for any person who has been educated in, or at any time has professed, Christianity to deny the truth of the Christian religion or the Divine authority of both Old and New Testament; he is declared incapable of holding any civil or military office after conviction, and upon a second conviction debarred altogether from bringing any action or acting as an executor or administrator, offices formerly held under the authority of the ecclesiastical courts. While it is proper that ribald or indecent attacks on the Christian or any other religion, since they tend to promote a breach of the peace, should be restrained by punishment, the law upon the point seems rather out of date and requires amendment.—*Ibid* p. 669.

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Lord Haldane and the Privy Council.—Any misgivings that may have been felt about Lord Haldane's adumbration of a scheme for what was called an 'Imperial Assize' are, happily, removed by the authorized explanation of his remarks given by the Rhodes lecturer at University College last Tuesday. It is now clear that no such thing as an Imperial Assize was ever intended; it was never seriously contemplated that the Judicial Committee should go on circuit throughout the Dominions. That would have been a totally impracticable proposal, and the Lord Chancellor is not given to the putting forward of schemes of impracticability. 'What he does propose, as we are now explicitly assured, is that in cases of great and exceptional importance where the circumstances are such as to give asitting in a particular Dominion a peculiar value, judges should be

selected from the enlarged panel of the Committee to go and sit there. Nothing better than this could be desired. It gives reality to the functions of the Privy Council as an Imperially consultative and judicial body, and it satisfies at the same time the legitimate demand of the self-governing Dominions that appeals on matters involving a consideration of local conditions shall not be decided, as it were, *in vacuo*, but with some regard to the special circumstances which every judicial tribunal—and especially such a body as the Judicial Committee—must take into account if it wishes to preserve its authority as the dispenser of something more useful than abstract justice. No one would deny that in cases of boundary disputes, or in such a matter as was decided only this week in the claim of Provinces of a Dominion to grant exclusive rights to fish in territorial waters, the Power of the Judicial Committee to hold a special sitting on the spot would add immeasurably to the weight of the decision and the influence of the Imperial tribunal. And although that is a long way from the acceptance of the new canon which some have claimed to set up for the self-governing Dominions—that their Supreme Courts of Appeal shall not be outside themselves—it goes far towards a recognition of their claim to be treated on an equal footing with all other parts of the Empire in judicial as in other affairs. Lord Haldane's suggestions, tentative as they were, contained the seed of a great idea and, as now explained, they may be said even to ingeminate a greater union.—*Ibid* p. 697.

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The Executive and the Law.—One of the many wise thoughts which Lord Morley puts in aphoristic form in his newly-published 'Notes on Politics and History' is the following:

Weakened confidence in our Parliament would be formidable, but confidence destroyed in courts of Justice would be taking out the linch-pin.

The recent tendency of the Executive to encroach upon the province of the Judiciary is, unfortunately, calculated to loosen the 'linch-pin.' While the Government, of which Lord Morley is so distinguished a member is constantly seeking to confer upon Departments the functions that properly belong to the Bench, the public, or rather such part of it as Ministerial schemes are intended to appeal to, can hardly be expected to retain that confidence in the Courts to which Lord Morley rightly attaches so much importance. Fortunately, however, the jurisdiction of the Courts is not easily to be ousted. As the President of the Liverpool Law Society points

out, in the address reported in another column, six cases have recently been heard in the Courts in which, after the jurisdiction of the judges had been unsuccessfully challenged by the Crown, Orders or Requisitions made by various Departments of the State have been held to be illegal. The proposals for the reform of the land laws which are now being put before the country indicate, unfortunately, that the mischievous tendency is not declining.—*Ibid* p. 698.

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Annual Address of the Liverpool Law Society.—"Last year my predecessor (Mr. Norris) drew attention to the growing danger to the liberties of the public from the rapid increase in this country of officialism and from the usurpation by the Executive of the functions of the Judiciary. I entirely concur in the views which he then expressed. In regard to officialism, I will only say that the situation to-day is even more serious than it was a year ago; for, if the past twelve months have not witnessed the creation of a large number of new officials, there are proposals now being placed before the country which if adopted by Parliament, will greatly extend, and in some instances in entirely new directions, the sphere of officialism. But, important as this question of officialism undoubtedly is—and I, for one, have no desire to minimise its importance in any way—it is in my opinion less fraught with danger to the public welfare than the assumption by the Executive of judicial powers. For some years past it has been a common practice on the part of the Legislature to empower a Department of State or a public official to make and issue Rules, having the force of Statutes, regulating and even extending the application of the Act to which the Rules relate. Furthermore, in more recent times there has been an increasing tendency to confer on a Department of State or some especially constituted body full authority to determine, without appeal or any resource to the courts, questions arising under a particular enactment. As illustrating this modern practice on the part of the Legislature, I may point out that during last Session two bills were introduced into the House of Commons, one a Government measure and the other a private member's bill, in both of which the same mischief appeared. The first bill referred to was the Revenue Bill, which in clause 10 provided that any decision of the Commissioners under that clause was to be final and not subject to any appeal. The other bill was one to amend the Public Trustee Act, 1906. That bill provided that where the Public Trustee was satisfied that it was the desire of the beneficiaries that he should become the sole trustee of a trust, he might, by writing, signed and

sealed by him, declare his acceptance of the trust, and thereupon he was to become sole trustee to the exclusion of any other person. It was further provided that the Public Trustee was to be authorised to accept as sufficient evidence a statutory declaration of any person appearing to have personal knowlege of the facts. Fortunately, so far as my present point is concerned, neither bill reached a third reading. If evidence were needed as to the unfitness of Departments of State to determine questions involving the consideration of points of law, I would remind you that the courts have been called upon to determine the validity of orders or requisitions made by various Government Departments. And in no less than six reported decisions affecting such different public offices as the Charity Commissioners, the Board of Education, the Board of Inland Revenue and the Local Government Board the orders of requisitions in question were held to be illegal. It is significant also to observe that in all the six cases the jurisdiction of the court was strenuously resisted by the Department concerned. I cannot believe that there is any desire on the part of the public to substitute for a trial in one of his Majesty's courts a decision of a tribunal composed of some person or persons in the employment of the State no doubt, but unknown and invisible to the parties, whose decision, unsupported by reasons and arrived at without hearing argument on either side, is communicated to the parties, without any disclosure of the evidence or information upon which it is based, and which may wholly or in part have been obtained by the tribunal behind their backs. Even such essential characteristics of a judicial inquiry as impartiality and independence on the part of the tribunal are likely to be absent, for in most instances the persons appointed to adjudicate will be officials, whose duty it is to assist in the administration of the Act of Parliament under which the proceedings have been instituted. Such a procedure, adopted by the Local Government Board in one of the cases to which I have referred, was a few weeks ago pronounced by two members of the Court of Appeal to be contrary to natural justice. In my opinion the increase of the bureaucratic element in the Government of this country threatens to become so serious a menace to the liberty of the subject that it behoves all who are interested in the nation's welfare to take every means in their power to warn the public of the impending danger ; *Ibid* p. 705.

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The Judicial Committee.—Professor J. H. Morgan, in his concluding Rhodes lecture at University College, Gower Street, on Tuesday night, gave an authorised explanation of Lord Haldane's remarks (reported in the Law Journal of November 8) when presiding at the first lecture. Professor Morgan said :—'In concluding this course of lectures I should like to say that I am authorised by the Lord Chancellor to make a statement about the suggestions thrown out by him when presiding at my first lecture as to the future development of the Judicial Committee. They were, as you will remember, the Lord Chancellor was careful to insist, merely suggestions. They have naturally attracted great attention, and they have excited, as perhaps they were meant to excite, some criticism. Generally they have been warmly welcomed as containing the germ of a great idea, but in one or two quarters they have been misunderstood. They did not propose that the Judicial Committee should go on circuit throughout the Dominions. No one who was actually present on the occasion of Lord Haldane's speech could have imagined that they did. What they did propose was that in cases of great and exceptional importance, where the circumstances were such as to give a sitting in a particular Dominion a particular value, a number of Judges should be selected from the enlarged panel to go and sit there. It should be remembered, as anyone who looks at the Statutes of 1833 and 1844 may discover for himself, that the Judicial Committee is a body possessing, as an Appellate Tribunal, exceptional powers of directing the examination of witnesses on oath and of directing inquiries into issues of fact in particular cases, and one can well conceive that there might be cases in which such inquiries were best held in the Dominion itself. The Committee has already begun to group appeals from a particular Dominion so as to facilitate their hearing during a particular period —a practice which has enabled the Law Officers and the Chief Justice of Canada to be present when Canadian cases are heard. From this it is but a step to provide for an occasional sitting in Canada itself.'—*Ibid* p. 706.

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The Late r. Justice P R Sundara Aiyar.

REFERENCE IN THE MADRAS HIGH COURT.

On Monday the 22nd December, 1913. all the Judges of the High Court except the Chief Justice who was absent from Madras being assembled in the second court.

The Advocate-General addressed their Lordships as follows :—

I rise my lords under stress of considerable emotion to condole with Your Lordships upon the loss which you, in common with ourselves, have suffered by the death of the late lamented Judge whose loss we deplore. My Lords I feel ·considerable diffidence in addressing you because I see around me many far better able to do so than I am. Though my acquaintance with the learned Judge dates back only from October last year, still it was my privilege on several occasions during his last illness to visit him and to have long talks with him which gave me an insight into his character which would have been denied to me if I had known him only as a Judge. My Lords, the learned Judge had a very distinguished career at the Christian College where he carried off the Gold medals in several subjects and he passed first in the whole Presidency in the examination for the degree of Bachelor of Laws. That my Lords, merely indicated the extraordinary character of his industry through life. This was the outstanding characteristic of the learned Judge in that he was devoted entirely to his work and that he thought of very little else than his duty. As a lawyer whether at the Bar or on the Bench, it is not for me to speak. I would only say this, that it was characterised by a careful preparation and by rapidity-rapidity which was sometimes not liked by Counsel, but which nevertheless made for the quick discharge of business. Of his keenness with regard to the profession there is a good deal to be said, because he alone of all the Judges and for the first time in the history of this Presidency, took the trouble to prepare lectures for the benefit of apprentices to whom he lectured under Your Lordship's auspices on the Ethics and Etiquette of the Profession. If I may venture to touch upon another aspect of his character I would say that it was signalised by his faithfulness to his friendships, by his never failing kindness to those he had known early in life and by his goodness to his former pupils. Of his piety it is not for me to speak but of that he has given ample proof. In Education he was keenly interested and his interest took not only the ordinary form of subscriptions and so on but also the more troublesome form of assisting numbers of students. The learned Judge was fortunate early in life in being associated with such distinguished men as the late Mr. V. Krishnaswamy Aiyar and the Hon'ble Mr. P. S. Sivaswamy Aiyar with whom indeed he began his career at the Bar. He was a pupil of Sir S. Subramania Aiyar. But there is this to be remembered about him that his success was not due to his early friendships, but to his own efforts. He was entirely the architect of his own fortunes. My Lords, we all feel, I speak on behalf of every branch of the legal profession of this Presidency, that Your Lordships in common with ourselves have suffered a great loss

by the death of Mr. Justice Sundara Aiyar. We desire to place on record our sincere condolence and the expression of our profound regret. My Lords, Mr. R Shadagopachariar, a friend of the learned Judge desires permission to address your Lordships when I have concluded.

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MR. R. SHADAGOPACHARY.

Mr. R. Sadagopachary on behalf of the Vakils, then addressed their Lordships as follows :—My Lords, It is my melancholy and sad duty to announce to your Lordships, the sad and premature death, of Mr. Justice Sundara Aiyar. We all hoped that the learned Judge would soon recover, and would resume his useful work on the Bench. Nobody ever dreamt that death was so near, and would snatch away that brilliant gentleman. My Lords, within the last five or six years, we had to mourn the loss of such leaders as Raja T. Rama Rao, Mr. P. Ananda Charlu, Mr. Ramachandra Rao Sahib, and Sir V. Bhashyam Iyengar, and only the year before last we lost another esteemed Judge, Mr. V. Krishnaswamy Aiyar. Our tears have not yet dried, before this calamity again happened. As one of the oldest Vakils of this Court I had the rare privilege of knowing the late Judge, Mr. Justice Sundara Aiyar, very intimately. His scholastic and university career gave promise of the future man, and subsequent events proved that he was a brilliant lawyer, and splendid Judge. He commenced practice in 1887, and soon after that his merits for able advocacy attracted the attention of that great Judge Sir Subramania Aiyar, who helped him on, so that his progress was considerably accelerated by the liberal assistance, which was rendered by him and it was not very difficult for him, after the elevation of Sir Subramania Aiyar to the Bench, to step into the shoes of his patron, friend and admirer. And as a vakil of this Hon'ble Court his success was unique in the annals of this Hon'ble Court. There are no cases of importance, in which he did not figure. The Indian Law Reports, in some of which his arguments are recorded are a cogent testimony to the brilliancy of his intellect and to the quick grasp of the fundamental principles of jurisprudence. His courtesy to the bar was inimitable. And it was not all. His activity was varied. He was the Editor of the Madras Law Journal, and the learned Leaders and the critical notes which were to be found from time to time go to show his quick grasp of the principles of law. He was also connected with the Vakils' Association, and he tried his very best to enhance its utility and to put it on a very satisfactory footing. This shows again his love for

his brethren in his profession. His lectures on Professional Ethics as the learned Advocate General pointed out, go to show what a high ideal he wanted to place before himself both as a lawyer and also as a Judge. They also show the audience of his desire to infuse those ideals into the young and the budding minds of the would-be-vakils. My Lords, it is not only as a Judge and as a lawyer we deplore his loss ; apart from these two, he was taking a prominent interest during his career as a Vakil in all matters public, and he contributed not a little to the formation of healthy and sound views on the burning topics of the day. Nature which was so prodigal so far as the learned Judge was concerned in regard to all her gifts of rare qualities, which marked him as a great man was niggardly with regard to the longevity of his life. It is not as it ought to be. The late Judge took advantage of every possible opportunity to do good to his fellow creatures. As to his achievement as a Judge, your Lordships know it much better than I do. It is no exaggeration to say that so far as judicial acumen, strict integrity, stern impartiality, quick grasp of facts and sobriety of judgment were concerned, he was second to none. The Indian Law Reports which contain some of his decisions bear testimony to his unquenchable thirst for knowledge, his indefatigable search for authority and firm grasp of the principles of law. I venture to say that his death is a national calamity. The High Court lost one of its brightest gems, the society lost one of its healthy advisers, the country lost a very valuable asset, and last of all, but not the least, the Crown lost a painstaking conscientious and loyal public servant. It is a great pity that he did not enjoy a longer lease of life in order that he might exert the whole of his faculties when they were becoming ripe and beginning to unfold many of the blossoms. It is a great pity that he was not in a position to still more embellish the Indian Law Reports, because the cruel hand of death snatched him away. A bright and great man has passed away from us. He was a religious, pious and God-fearing citizen. The only duty that remains for me to do is to convey the condolence of all the Vakils to the bereaved family.

MR. JUSTICE WALLIS.

The Hon'ble Sir John Wallis on behalf of the Bench replied as follows:—Mr. Advocate General and Mr. Sadagopachariar, I have in the fist place to express my regret that his Lordship the Chief Justice is unavoidably prevented from being present to-day to give a fitting expression to our feelings on the melancholy occasion. He has telegraphed asking me to say that he is with us in our expression

of the loss which we have sustained. On behalf of my colleagues and myself I desire to say that we most fully agree in all that has so worthily been spoken by the Advocate General and by Mr. Sadagopachriar in recognition of the great qualities of the colleague whom we have now to mourn and who has been prematurely snatched away by an untimely fate. As has been observed, the late Judge started life with fewer advantages than most of his contemporaries. After a brilliant scholastic career, philosophy, I believe had first claimed him, he soon devoted himself to law and having had the good fortune to obtain his instruction in that field from Sir S. Subramania Aiyar, he rapidly came to the front. Some of us whose memories go back a few years, may think that perhaps he reached the zenith of his career a few years before his first illness. Then he had a commanding position at the Bar and displayed in a degree surpassed by none, the qualities of great advocacy—directness and force, the power of brushing aside details and getting to the heart of a question. In these qualities, if I may venture to a personal appreciation, he was surpassed by none of his contemporaries. But the strain which he put upon himself was too great even for his powerful personality. It may be remembered he was laid up for a year or two. We also remember the ease with which he resumed his position at the Bar when he came back and with what universal satisfaction his appointment to succeed his life-long friend Mr. Krishnaswamy Aiyar was welcomed. With regard to his work as a Judge I feel sure that my colleagues as I do myself, agree with all that has so eloquently been spoken by Mr. Sadagopachariar. There can be little doubt of the permanent value of the contribution which he was permitted to make in the brief time at his disposal which I think was under two years. If I may say so, the very elaboration and the desire to exhaust the subject which characterise some of his Judgments, while due no doubt to the thoroughness of the man, may also perhaps have been to some degree due to the feeling that his time was possibly short. I need say little after what has been already said as to the interest which he continued to take in the profession after his elevation to the Bench and the alacrity with which he accepted the duty to deliver the first course of lectures on professional conduct and advocacy and of the satisfactory manner in which he discharged that task for two consecutive years. I was also glad to hear the learned Advocate General's allusion to the interest which he always took in his pupils whom he had trained and the pleasure which any appreciation of their work always gave him. As Mr. Sadagopachariar has said the late Mr. Justice Sundara Aiyar was not only a lawyer but was also a public spirited citizen.

I am not saying too much that in that capacity he earned a great reputation as a wise and courageous man. There is just one field of his activities to which I may be permitted to refer. For three years he was my colleague on the Syndicate of the University. In the few months during which we have been deprived of his society owing to illness we have deeply felt his loss both on the Syndicate and the Senate. It is a loss which it will indeed be difficult to replace. As characteristic of the man I may mention that on the last occasion when I had the pleasure of seeing him when his illness had momentarily taken a turn for the better, he asked that the Syndicate boxes should be continued to be sent to him and *added*—something stiff. No man is of course indispensable. But by the death of Mr. Justice Sundara Aiyar, both the profession and the public in this Presidency have sustained a loss which it will indeed be difficult to replace.' As a mark of respect to his memory, the Court will adjourn for the rest of the day.

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for November, Mr. Willinston questions the correctness of the decision of the House of Lords in the recent case of *Heilbut* v. *Buckleton*[1]. That was a suit for a breach of warranty. Plaintiff inquired of the defendant whether his firm was bringing out a new Rubber Company. Defendant replied they were. The plaintiff then asked whether the company was all right; the defendant answered that his firm was bringing it out and the plaintiff said that that was good enough for him. Plaintiff was induced by this conversation to purchase shares of the new company which proved a failure. It turned out that the company was doing not only rubber business but many other kinds of business. The Court of Appeal held that on these facts the defendant must be taken to have warranted the truth of the statement that the company was a rubber company. The House of Lords on the other hand emphatically held that there was but a representation in the case and in the absence of anything to indicate that there was an intention to contract, the animus contrahendi, defendant was not liable. Mr. Willinston says that this decision is wrong. He thinks that the principle acted upon in the case of sale of goods that a representation of fact, (not being mere opinion) with respect to the subject matter of the sale amounts to warranty should have been applied to this case as well, and the opinion of the Court of Appeal should have been upheld.

1. (1913) Ap. Cases 30,

In the October number of the *Canadian Law Times*, Mr. Sherman discusses the indebtedness of modern jurisprudence to the Mediaeval Italian Law. Italy revived the Roman Law for Western Europe by the exertions of its glossators. Her University of Bologna where Roman Law was assiduously taught served as a model to the other Universities that came to be established. Through the labours of the Lombard Vacarius, began the Mediaeval reception of Roman Law in England. To the Italian Placentinus is due the founding of the first French Law School at Marthellier, in Southern France. Thus was introduced into France the study of law and the system of glossators. The thirteenth century English Chief justiciar of Henry I. Bracton, the father of English Common Law used freely and often copied word for word the work of Azo, the Bologna Professor of Law. The son of Accussing a disciple of Azo, gave lectures on Law at the Oxford University in1275-76 during the reign of Edward I. Roman Law was also revived in the Mediaeval commercial compilations of Maritime law which originated in Italy. Ensolato Del Mare, one of those compilations dealing with maritime law is one of the earliest sources of modern law as to international trade relations. Though Canon Law never became the secular law of Europe, it had immense influence over the latter. The celebrated *commentators* of Italy, Bartolus especially, served to make a common European jurisprudence. His commentaries on Roman Law received at one time statutory authority in Spain and Portugal. In France, the opinions of Bartolus were so influential in Courts of Justice that their weight gave rise to proverbial expressions "*plus resolu que Bartole*" "*resolu consure un Bartole.*" He is to be regarded as the creator of the common law of Germany which sprang from the reception of Roman Law in the German States.

In the same issue of the Journal, Mr. Henry Happold gives an account of Betrothals and Marriages in Germany. In Germany, there is no breach of promise of marriage action as in England. In case either party refuses to enter into the marriage, then he or she has to pay to the other and their respective parents or such persons as have stood in the place of parents, such damages as they have sustained by reason of having in expectation of the marriage incurred expense. Conpensation need not be paid, if there was good reason for either party not marrying the other. A woman who is of blameless character and has permitted the man to whom she is betrothed to have carnal knowledge of her can, if the man withdraws, claim monetary damages. In case no marriage takes place presents have to be return-

ed. There are rules as to consent of parents, of adoptive parents, and of the guardianship court in the case of persons below a certain age. A person who has adopted another cannot marry the person adopted; if marriage takes place, adoption comes to an end. A woman cannot remarry for ten months after the dissolution of marriage. Ordinarily six months' publication is necessary before a marriage takes place but it may be dispensed with where one of the betrothed is too ill and the ceremony cannot be postponed. The marriage in every case is a civil one but the parties, if they so desire, can have it followed by a religious ceremony.

Mr. George H. Paremele contributes the third of the series dealing with the evolution of Modern Law Books under the heading "Annotation Problem." He rightly points out that mere grouping or massing of cases under broad statements of principles and rules without specific applications, contradictions, limitations and distinctions however attractive to the merely academic reader is of little value for the practitioner and the Judge.

Sometime back, we noticed an article of Mr. Beale in the *Harward Law Review* on the jurisdiction of courts over foreigners. In an article contributed to the December number of that Magazine, he discusses the power of courts to compel an absent foreigner, through jurisdiction over property belonging to him, to discharge his obligations. The typical example of jurisdiction in rem is the jurisdiction of the court of Admiralty over any vessel within the territorial waters of its sovereign. Other instances are suits relating to land and chattels, within court's jurisdiction. Though no personal decree can be passed against the foreigner, the court can enforce the lien against the land or chattel. In the case of chattels, the condition of jurisdiction is the existence of the chattel within the court's jurisdiction. It is not quite settled whether mercantile paper is a chattel within the meaning of the rule. The mercantile view seems to be that it is. An extreme mode of the exercise of jurisdiction is by what is called the foreign attachment or garnishee proceedings. It had its origin from the custom of London. Under that procedure an action is maintainable against a person resident within the jurisdiction of the court from whom a debt is payable to the foreign debtor for its recovery and application of the amount in discharge of the debt due to the plaintiff. The writer traces the history of this form of action, and how the original nature of the action as a composite or double action against the debtor and the debtor's creditor has been forgotten and how as a result the only test of at present applied for the court's jurisdiction is the garnishee's presence within the court's jurisdiction. The

French mode of dealing with the question is to bring an action against the garnishee in the court in which he can be sued for injunction not to pay the debt over to the debtor pending an action by the plaintiff against the principal debtor in the court to which the latter is subject. What is the situs of debt is one of the subsidiary questions dealt with in the paper.

If money to which person is legally or equitably entitled is wrongfully mingled by another with his own monies, so that the whole forms an indistinguishable mass it was at one time held that all right to follow it is lost because it can no longer be identified. It was said that money had no ear-mark. This view no longer holds. According to the present view the person wronged has an option, in addition to a personal claim against the wrong-doer between a charge on the whole mass for the amount contributed by him and ownership in equity of a proportionate part of the whole. Mr. Austin W. Scott discusses the application of the modern rule under varying conditions. The several circumstances considered by him are (i) suppose a man deposits a certain amount consisting partly of his own money and partly of another's and then withdraws leaving some amount; (ii) suppose subsequently he invests the amount withdrawn but squanders the amount left with the bank; (iii) suppose again after once withdrawing he makes additions to his original deposit; what are the rights of the person wronged under these various conditions. The answer given by him is that the person wronged has not only the right to proceed against the amount remaining but he is equally entitled to proceed against the amount withdrawn if it is traceable. Ordinarily speaking in the absence of special circumstances he is not entitled to fresh additions made. His right is restricted to the lowest balance after the original deposit. The special circumstances under which he would be entitled to the additions are where, for instance, there is indication that the additions are made from a desire to make a reparation or even if there is no such desire, where the original deposit was on a trust account and deposits are made in that account after a wrongful withdrawal.

Another writer Mr. Edward P. Robers puts in a vigorous plea for the courts giving relief in cases of what he calls *predatory price cutting*. It consists in underselling known articles with a view to attract customers to be able to sell them other goods, which invariably results in the loss of trade for the owner of the articles. He shows how the original idea that only trade marks were protected, has given way to "passing off" actions as they are called in England

or actions against "unfair competition" as they are called in America, how there has been progress by protecting against unfair use of even geographical names with a view to mislead people as to the origin of articles and how it is only necessary that this particular form of unfair trading ought to be restrained. The Tribunal of Commerce in Brussels seems to have held certain phases of price-cutting to amount to unfair trading. A Danish statute expressly prohibits it.

In the *Michigan Law Review for November*, Mr. J. W. Bingham discusses the nature of legal rights and duties. This comes as a supplement to his discussion as to "What is the Law" which we have already noticed. According to him when we speak of a legal right we assert the potentiality of certain legal consequences in a given set of circumstances. In this view, legal remedies are not the result of legal rights; on the other hand, potentiality of legal remedies is of the essence of legal rights. The second thing that he says is that the division of legal rights and duties into primary or substantive, and secondary or remedial is only a classification of conditions, conduct and events in their aspect of barriers to condemnatory legal consequences. He thinks that it is an error to say that legal rights and legal duties are correlative; on the other hand, he says that they are both one. While speaking of one thing, you lay stress on one aspect of the case; while speaking of the other, you lay stress on the other aspect. He has many interesting observations to make about other legal terms e.g., legal right of action, rights in personam, and rights in rem. Mr. Charles Sherman in an article contributed to the same Review for December, considers the "Debt of the Modern Law of Guardianship to Roman Law". In insisting upon security being given, in the guardians' liability for fraud and neglect etc., in the duty to take a discharge from the ward after attaining majority rendering full accounts and in the necessity for sanction before alienation, the Modern Law is like the Roman Law. Under the modern Law, according to some systems, the sanction is to be of the family council, according to the English and American, of the court. The Roman Law recognised three stages in a person's immaturity. First, when he was incapable of acting, the second when his acts required the ratification of his guardian and a third stage when he was legally competent to act but was given a person to give counsel and advice. The first stage was for 7 years of a man's life, the next stage continued till he was 14. The last after 14 till 25. No man was however compelled to have a curator against his will after 14

unless insane, or engaged in law suit or unless a debtor wished to compel him to receive a debt. Guardianship *ad litem* is a survival of the old Roman system of curator for suit. Except as to criminal responsibility and except in a way as to voidablility of contracts, the English law does not make a difierence between the first two stages in minority. Early Roman Law recognised perpetual guardianship to women but the later law gave it up and no modern system recognises it. Modern law has assimilated curatorship and guardianship and assigns a guardian till the age of majority whose duties and functions are the same throughout. The Roman law appointed curators for insane persons, spendthrifts and other naturally incapable persons. Though the English system does not recognise guardians for spendthrifts, some other systems do. For insanes, idiots and imbecials, all systems appoint guardians. Guardianship was considered a public duty in Rome. It is the same under modern systems, the king or the state being regarded as the *parens patriae.*

In the University of Penyslvania Law Review (we take this from the Canadian Law Times where the article is reproduced) ·Mr. Layton B Register discusses the contributions of various nations to the Commercial Law or the Law Merchant, as it is technically called, how it is the resultant of the customs and adjudications of the courts of the Italian Trade guilds, the law administered to the conglomeration of merchants from all parts of the world to the *Fairs* in France, the customs of the Hanseatic League, the three codes of maritime law, the *consulate of the sea* in the Catalan language that appeared in Barcelona in the XII century, the Rolls or judgments of Oleron which were the law on the Atlantic coast and the laws of Wisby that obtained in the Baltic Coast.

The place of honor in the Journal of the Society of Comparative Legislation for October is appropriately given to the now famous address of the Lord Chancellor on *Higher Nationality*. Dr. H. P. Stevens makes an attempt to reconstruct the condition of the law of the Roman Republic in the age of the Punic Wars by a study of the dramas of Plautius. We find there indications of right by birth which we still have under the Hindu Law. We find the transition from unfeed advocates to advocates feed, possibly on the sly. The Romans seem to have already arrived at a dignified notion of marriage contract.

Mr. Amasa M. Eaton records a protest against the practice of some courts to ignore the Negotiable Instruments Act where there is

one and to refer only to the previous decisions. The very object of codifying the law being to obviate the necessity of having to roam over a vast mass of precedents, it is wrong on the part of courts to perpetuate the old condition of things by referring to the very precedents which are superseded and which, in addition, may or may not wholly agree with the Code.

BOOK REVIEWS.

The Indian Decisions (New Series) by the Lawyer's Companion Office. Vol. III. We beg to acknowledge the receipt of the 3rd volume of this series—Madras section. This brings us to the end of 10 Madras, that is, about half way to the end.

The law of Benamee transactions by C. S. Saminatha Sastry B.A. B.L. and P. Ramanatha Iyer B.A. B.L. First Grade Pleaders (1913). We trust that the book will be found useful by the profession as a convenient hand book containing the case law on the subject of Benami transactions. The value of the book would have been considerably enhanced if the authors had paid more attention to scientific treatment. The authors would have done well to define 'Benami' and to explain the various senses in which that term has been used before laying down tests of Benami. A Benamidar may be a mere alias or prete nom as the Privy Council call him in a recent case and this is the usual meaning of the term; he may be an agent, he may be a nominal transferee from the real owner, he may be the ostensible vendee under a real sale, he may be the purchaser with the funds of another or of others including himself; he may be acting for others; or he may not be. In addition, there are possibilities of benami gifts and even benami wills being set up. All these cannot be disposed of by one uniform treatment. The legal incidents of one kind of Benami must be entirely different, from another kind of benamee. To have pointed out the distinction and the precise incidents of each of the various kinds of benami would have cleared much of the confusion surrounding the subject and have been a real service. The chapter on the origin of the English law of Trusts seems to us to be wholly out of place. Similarly the discussion as to the origin of the Hindu law of trusts. In addition, it is inadequate. Far from assimilating Benami to known legal relationships, the authors seem to have assimilated numerous other legal relationships to Benami, hardly a luminous way of dealing with the subject.